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IN THE

Supreme Court of the United States

FAWZI KHALID ABDULLAH FAHAD AL ODAH, *et al.*,

Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*,

Respondents.

SHAFIQ RASUL, *et al.*,

Petitioners,

v.

GEORGE W. BUSH, *et al.*,

Respondents.

On Writ of Certiorari to the United States
Court of Appeals for the District of Columbia Circuit

BRIEF OF THE CENTER FOR JUSTICE AND ACCOUNTABILITY, THE INTERNATIONAL LEAGUE FOR HUMAN RIGHTS, AND INDIVIDUAL ADVOCATES FOR THE INDEPENDENCE OF THE JUDICIARY IN EMERGING DEMOCRACIES AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

Amici are the Center for Justice and Accountability and the International League for Human Rights, both non-governmental organizations, and also the individuals Youk Chhang, Benjamin Cuellar, Vojin Dimitrijevic, Tahir Elci, Jakob Finci, Gustavo Gallón, Sudarshana Gunawardana, Chandra Kanagasabai, Mulya Lubis, Lia Mukhashavria, Ahmed Othmani, Dr. Aurora Parong, Dr. Marijan Pavčnik, Naly Pilorge, Carlos Slepoy Prada, Lakshman Kumar Upadhyaya, and Benjamin Hyun Yoon. While *amici* hail from many countries and have diverse backgrounds, all share an interest in defending the rights of individuals against the arbitrary actions of governments, particularly in countries that are emerging as democracies within the community of nations. One of the most important of these rights is the protection of individuals from indefinite detentions. Toward that end, they all recognize that a strong, independent judiciary with the power to review executive action is critical to the defense of individual rights. *Amici* also recognize the profound influence of the examples set by the United States and this Court. Defenders of democracy and human rights in the home countries of all individual *amici* look to the rule of law modeled by the United States. The maintenance and promotion of a strong and independent judiciary is key to the missions to which the institutional *amici* are dedicated, and to the struggles each of the individual *amici* face in their native countries.

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[1] All parties have consented to the filing of this brief. Their letters are on file with the Clerk of this Court. Pursuant to Rule 37.6, *amici* state that no counsel for any party has authored this brief in whole or in part, and no person or entity other than amici and their counsel contributed monetarily to its preparation or submission.

Institutional *Amici*

The **Center for Justice & Accountability** ("CJA") seeks, by use of the legal systems, to deter torture and other human rights abuses around the world. CJA represents survivors and family members of those who have been killed or who have disappeared in civil suits brought against the perpetrators. CJA's mission is to help survivors and family members to break the silence that surrounds the atrocities committed against them so that they can move forward with their lives, gain hope in the possibility of justice, and ensure that their abusers cannot live in impunity. CJA also defends due process rights for all detainees, as one of the essential minimum protections against torture.

The **International League for Human Rights** (the "League") is America's oldest human rights advocacy organization. Its directors have historically been drawn from human rights advocates in the United States and around the world and have included key authors of the Universal Declaration of Human Rights and most major human rights covenants. The League works with an international network of affiliates and is engaged in building the capacity of human rights advocacy organizations around the world, with special emphasis on the nations in transition and the developing world.

Individual *Amici*

Youk Chhang is the Director of the Documentation Center of Cambodia, which has been at the forefront of documenting the atrocities of the Khmer Rouge era since 1995. Mr. Chhang previously managed and led political, human rights and democracy training programs in Cambodia on democratic institutions for the International Republican

Institute. He was also associated with the Electoral Component of the United Nations Transitional Administration in Cambodia.

Benjamin Cuellar has been the Director of IDHUCA (the Human Rights Institute of the José Simeon Cañas, Central American University of El Salvador) since 1992. Since its founding in 1985, the Institute has actively participated in the denunciation of human rights violations in El Salvador, including such notorious cases as the murders of six Jesuit priests in 1989. The Institute challenges unlawful detentions, works to ensure that the state security forces follow the law, and has been a staunch advocate for the independence and impartiality of the judiciary.

Vojin Dimitrijevic is the Director of the Belgrade Centre for Human Rights. He has written and lectured extensively around the world on human rights issues and political reform in Yugoslavia and Eastern Europe. He taught international law at the University of Belgrade Law School. He is a Judge Ad Hoc on the International Court of Justice in a case concerning the punishment of genocide in Bosnia and Herzegovina. He is also a former Rapporteur and Vice-Chairman of the U.N. Human Rights Committee and former Chairman of the Yugoslav Forum for Human Rights.

Tahir Elci is a lawyer in Turkey and a member of the IHD-Turkish Human Rights Center. He has long been active in bringing human rights complaints on behalf of Kurds and others in Turkey. Mr. Elci has represented many suspects in Turkey's State Security Court, a special court convened to enforce Turkey's anti-terror laws. In 1993, Mr. Elci was detained and tortured by the Turkish authorities because of his work to protect human rights. His case was ultimately heard by the European Court of Human Rights.

Jakob Finci is the head of the Civil Service Agency of Bosnia & Herzegovina and President of the Citizens Association for Truth and Reconciliation. During the Bosnian war of 1992-1995, Mr. Finci served as president of La Benevolencija, a humanitarian society that provided aid to all Bosnian citizens. He was the Executive Director of the Soros Foundation for Bosnia and Herzegovina and vice-president of FONDEKO, a foundation for improvement of the quality of life and sustainable development in Sarajevo.

Gustavo Gallón has been the Director of the Colombian Commission of Jurists ("CCJ") since 1988. He has fought abuses in the criminal justice system, as well as the government's continuous use of states of exception to suspend democratic rights. He was Special Representative for Equatorial Guinea of the United Nations' Human Rights Commission (1999-2002) and has received human rights awards from Human Rights Watch and the Lawyers Committee for Human Rights. CCJ received the International Human Rights Award of the American Bar Association's Litigation Section in 1993.

Sudarshana Gunawardana, an attorney in Sri Lanka, is the Program Coordinator of INFORM, a human rights documentation center in Colombo, and the Secretary General of the Movement for the Defense of Democratic Rights. He is also a member of the Asian Human Rights Commission.

Chandra Kanagasabai is a lawyer based in Singapore who helps secure civil and human rights on behalf of aboriginal and other marginalised people. On behalf of the Commonwealth Lawyers Association, she has trained Malaysian judges, including the Chief Justice, on judicial accountability. She has also co-edited a book on that subject. She has served as the Secretary General of Hakam, Malaysia's Human Rights Association, and has spoken at numerous human rights workshops in Southeast Asia.

Mulya Lubis holds law degrees from Harvard and the University of California, has been a driving force in protecting human rights, as well as in pressing for legal and financial reform, in Indonesia since the 1990s. As a government advisor, he has assisted with the prosecution for corruption of Suharto's colleagues. As a lawyer in private practice, he has represented defendants in some of Indonesia's most visible human rights cases.

Lia Mukhashavria is a lawyer in Georgia. Ms. Mukhashavria, who also holds an LLM from Temple University Law School, handled Georgia's first case before the European Court of Human Rights. She has represented many individuals detained without due process by the Georgian police and local authorities before the European Court of Human Rights. She has also worked closely with USAID, which has helped push for the development of a strong and independent judiciary in Georgia.

Ahmed Othmani was imprisoned in his native Tunisia in 1968 and repeatedly tortured during ten years of detention. After his release from prison, he continued his human rights activism, including by serving as a member of Amnesty International's International Executive Committee and head of the Department of Human Rights Education of the U.N. International Civil Mission in Haiti. In 1989, he helped found Penal Reform International, which has become the largest criminal justice reform NGO in the world, and has served as its Chairperson since 1994. He has written extensively about human rights and the impact of detention without charges on individuals and societies.

Dr. Aurora Parong is the Executive Director of the Task Force Detainees of the Philippines, a national human rights organization which documents cases of human rights violations and assists in the prosecution of perpetrators of such violations. It also assists victims of torture who are detained as suspected terrorists. Dr. Parong is a co-chair of Peace Camp, a coalition of more than 50 organizations and institutions promoting peace based on justice, human rights and the rule of law.

Dr. Marijan Pavčnik is a Professor of Law at the University of Ljubljana in Slovenia. Professor Pavcnik has long advocated on behalf of the rule of law, both before and after the break-up of the former Yugoslavia and since the birth of the new state of Slovenia. He has written and published extensively about legal theory and the rule of law.

Naly Pilorge is the Director of the Cambodian League for the Promotion and Defense of Human Rights (LICADHO). LICADHO was formed in the wake of the 1991 Paris Peace Process that ended the armed conflict in Cambodia. Its mission includes the promotion of the rule of law and human rights principles. LICADHO aims to achieve a democratic society that is peaceful and stable, and whose government and institutions are committed to human rights and social justice.

Carlos Slepoy Prada is originally from Argentina but has resided in Spain for over twenty years. He is one of the founders of the Argentine Association for Human Rights in Madrid. He was a victim of the military repression in Argentina when in 1976, as a law student in Buenos Aires, he was arrested and tortured in the Naval Mechanics School

(the principal torture center of the Argentine dictatorship). He is part of the team of prosecutors in the criminal actions in Spain against members of the military regimes of Argentina, Chile, and Guatemala.

Lakshman Kumar Upadhyaya is a Professor and member of the Law Faculty of Tribhuvan University, Nepal. As Dean of the Law Faculty from 1987 to 1990, he developed, with other colleagues, a course on human rights and humanitarian law for the LL.M. Program. He has written widely on the positive influence of the U.S. Constitution and legal traditions on Nepal's 1990 Constitution and efforts to safeguard judicial independence.

Benjamin Hyun Yoon is a Representative of the Citizens' Alliance for North Korean Human Rights. Mr. Yoon is a former Chairman of the Board of Amnesty International—Korea. He has become the foremost activist working to raise awareness of human rights problems in North Korea, including the plight of political prisoners detained since 1996. In 2003 he received the Democracy Award from the National Endowment for Democracy for his work to bring worldwide attention to the human rights crisis in North Korea.

SUMMARY OF ARGUMENT

For more than two hundred years, this Court has stood as a bulwark against unilateral action by the executive. In so doing, this Court has fulfilled its constitutional obligations. Still more, this Court has helped to make the United States a model for emerging democracies seeking to secure fundamental rights from encroachment by unchecked executive power.

This case threatens to break that fundamental line of defense against the tyranny of executive power. The executive claims that it can put its actions beyond the reach of the judiciary by holding people in the United States Naval Base at Guantánamo Bay, Cuba. This effort to place itself outside judicial control is fundamentally inconsistent with the structure of the U.S. government. The Constitution divides federal power among three co-equal branches, and no branch has the power to eliminate, unilaterally, the power of the others to review and, if necessary, correct its actions. Although this Court has at times deferred to the decisions of the executive and legislature when they act together, it has never abdicated its constitutional obligation to review the unilateral actions of either the executive or the legislature. Domestically, this case therefore represents an important test of this country's commitment to the independence of the judiciary.

This is chiefly, but not solely, a domestic concern. People around the world have long noted that the United States' experiment with a tripartite government and an independent judiciary has, with some notable and regretted missteps, succeeded in living up to the ideals expressed in its Constitution. They have noted that the federal judiciary, specifically this Court, has managed to guarantee civil liberties even in times of strife. This success has made the U.S. system a model for countries around the world, particularly countries seeking to construct a civil society after decades of tyranny and oppression.

However, these attempts to construct civil societies are consistently under assault. And as in this case, often the lead argument for dismantling such systems is national security. Indeed, some would-be democracies already have

begun to justify prolonged detentions without judicial review on the basis of the detentions at Guantánamo Bay.

Amici urge this Court to exercise jurisdiction over the claims asserted by the detainees at Guantánamo Bay not only because it is the only result consistent with more than two hundred years of legal precedent in this country, but also because the people of countries around the world look to the United States to uphold the ideals so elegantly reflected in its Constitution. When the United States fails to live up to these ideals, the cause of individual rights is diminished not just here but everywhere.

ARGUMENT

I. A GOVERNMENT WITH CHECKS AND BALANCES IS ESSENTIAL TO SAFEGUARDING INDIVIDUAL FREEDOMS.

A. For More Than 200 Years, The United States Has Recognized That A Strong, Independent Judiciary Is Essential To The Preservation Of Individual Liberties.

The United States was founded on the ideal that a tripartite system of government was essential to the preservation of freedom. Giving life to the political theories of such philosophers as Locke and Montesquieu, the Framers determined that freedom could only be assured if each branch of the government served as a check on the other. *See* Bernard Bailyn, *The Ideological Origins of the American Revolution* 26-30, 323 (1992); Gordon S. Wood, *The Creation Of The American Republic 1776-1787*, 150-52 (1993). According to Montesquieu, there can be no liberty "if the power of judging is not separate from legislative

power and from executive power . . . . If it were joined to executive power, the judge could have the force of an oppressor." Montesquieu, *The Spirit of the Laws* 157 (1748) (Anne Cohler, et al., eds. (1989)). Echoing Montesquieu, the Framers proclaimed that "The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny." THE FEDERALIST NO. 47 (James Madison); *see also Bowsher v. Synar*, 478 U.S. 714, 722 (1986) ("Even a cursory examination of the Constitution reveals the influence of Montesquieu's thesis that checks and balances were the foundation of a structure of government that would protect liberty.").

In this balance, the judiciary, no less than any other branch, ensures that the government of the United States does not, in one fell swoop or by increments, become tyrannical. While the U.S. system of government necessarily contemplates a series of checks and balances, the Framers and this Court recognized that those checks are a dead letter unless exercised. "The hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power, even to accomplish desirable objectives, must be resisted." *I.N.S. v. Chadha*, 462 U.S. 919, 951 (1983).

While these checks and balances must certainly be exercised in times of peace, they become all the more crucial in times of crisis. The Constitution is not a fair weather document. Its provisions do not allow either the executive or the legislative branches to dismantle it for convenience whatever the threat. "[T]he existence of inherent powers ex necessitate to meet an emergency . . . is something the

forefathers omitted. . . . Aside from suspension of the privilege of the writ of habeas corpus in time of rebellion or invasion . . . they made no express provision for exercise of extraordinary authority because of a crisis." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 649-50 (1952) (Jackson, J., concurring).

This is so because whatever the perceived threat, at all times "[t]he declared purpose of separating and dividing the powers of government [is] . . . to 'diffus[e] power the better to secure liberty,'" *Bowsher*, 478 U.S. at 721-22. To allow anything less would upset the very nature of the U.S. system of government and threaten individual rights. *See Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 125 (1866) (the Framers "knew . . . the nation they were founding . . . would be involved in war . . . and that unlimited power, wherever lodged at such a time, was especially hazardous to freemen").

B. Much of the World Has Followed The United States' Lead.

In the two and a half centuries since the Framers advocated for the importance of independent judicial review in preventing oppression and tyranny by an unchecked executive, history has proven them right. First, as discussed in Section II, *infra*, the example of the United States itself has demonstrated that this safeguard works. Second, as discussed in Section III, *infra*, the international conventions adopted by the United Nations and other intergovernmental organizations reflect the nearly universal, if often only aspirational, recognition of these principles by the global community. Finally, as discussed in Section IV, *infra*, the profoundly high regard with which these princi-

ples are held has been most dramatically demonstrated by the efforts and sacrifices of those struggling to establish their emerging democracies as stable, free and just countries within the community of nations.

Thus, the United States' heritage of a-judiciary empowered to check executive power has become more than a national hallmark. It has become a fundamental element of modern governments seeking to ensure individual freedoms. Just as the people of the United States have recognized that a strong judiciary is essential to individual freedoms, so too have the peoples of other nations around the world.

II. IN THE UNITED STATES, THIS COURT HAS ALWAYS EXERCISED JURISDICTION TO ENSURE THAT THE EXECUTIVE'S AUTHORITY TO DEPRIVE INDIVIDUAL RIGHTS IS CHECKED.

Consistent with its role in this system of government, this Court has always protected its role as the final arbiter of the propriety of executive actions. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). At the most basic level, the executive cannot unilaterally determine the scope of this Court's jurisdiction. *See United States v. Nixon*, 418 U.S. 683 (1974) (Supreme Court has power to review President's claim of absolute privilege); *see also Bartlett v. Bowen*, 816 F.2d 695 (D.C. Cir. 1987) (sovereign immunity doctrine does not permit Congress to preclude judicial review of congressional acts). Even acting together with Congress, the executive cannot usurp the power of the Supreme Court to review the constitutionality of its acts. *Chadha*, 462 U.S. at 941-42. This is as true

when we are at war as when we are peace. *See, e.g., Youngstown*, 343 U.S. 579. Although this Court recognizes that the executive has broad authority to prosecute war and maintain national security, *see, e.g., Ex parte Quirin*, 317 U.S. 1, 10 (1942), this Court has made clear that these powers have judicially circumscribed limits. "[W]hat are the allowable limits of military discretion, and whether or not they have been overstepped in a particular case, are *judicial* questions." *Sterling v. Constantin*, 287 U.S. 378, 401 (1932) (emphasis added); *see also Duncan v. Kahanamoku*, 327 U.S. 304, 321 n.18 (1946) (despite a declaration of "martial law" in the Territory of Hawaii after Japan attacked Pearl Harbor, Hawaiian inhabitants were fully entitled to constitutional protection during trial by military tribunals).

As it had in *Kahanamoku*, this Court curtailed executive action during the Korean conflict. Fearing that an imminent general strike in the steel industry threatened national security, President Truman directed the Secretary of Commerce to seize the steel mills. This Court enjoined the seizure on the grounds that the President did not possess authority under the "war power" to order that an industry be nationalized. *See Youngstown*, 343 U.S. 579.

Questions about the scope of unchecked executive power often arise when the executive insists that it can hold an individual indefinitely without trial, and particularly when the detained invokes the writ of habeas corpus. This Court traditionally has exercised jurisdiction over such challenges, recognizing the writ as a critical tool for checking the abuse of power by the executive. *I.N.S. v. St. Cyr*, 533 U.S. 289, 302 (2001) ("At its historical core, the writ of habeas corpus has served as a means of reviewing

the legality of Executive detention, and it is in that context that its protections have been strongest."); *Brown v. Allen*, 344 U.S. 443, 533 (1955) (Jackson, J., concurring in result) ("The historic purpose of the writ has been to relieve detention by executive authorities without judicial trial."); *cf.* THE FEDERALIST NO. 84 (Alexander Hamilton) ("[T]he practice of arbitrary imprisonments [has] been, in all ages, the favorite and most formidable instrument[ ] of tyranny.").

Moreover, this Court, notwithstanding the Suspension Clause (U.S. Const. Art. I, § 9, cl. 2), has put limits on the power of the political branches, even when acting together, to suspend the writ. The writ, according to this Court, cannot be suspended at the whim of either the executive or the legislative branch. Rather, this Court has held, even in a time of declared war or martial law, the writ may only be suspended when the courts are closed or when they cannot properly exercise the full limit of their jurisdiction. *Milligan*, 71 U.S. at 127. *See also St. Cyr*, 555 U.S. at 303-14 (Congress' attempt to prevent review by writ of habeas corpus of detention decision in immigration case did not foreclose review of legality of decision to detain).

To be sure, this Court often defers to the executive's decision to deprive people of their liberty, particularly where the executive is simply implementing a Congressional directive. But this Court has not abdicated the power to review executive action. Rather, this Court chooses not to second-guess the executive's decision after satisfying itself that the executive has indeed acted constitutionally and within the scope of legislative authorization. *See, e.g.*, *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936) (reviewing decision of executive branch to criminalize action to determine if authorized by joint resolution of Congress); *Hirabayashi v. United States*, 320 U.S. 81, 93 (1943) (when Congress and the President act together in matters concerning war "it is not for any court to sit in review of the wisdom of their action or substitute its judgment for theirs"); *see also Korematsu v. United States*, 323 U.S. 214, 217-18 (1945) ("[W]e are unable to conclude that it was beyond the war power of *Congress and the Executive* to exclude those of Japanese ancestry from the West Coast war area .... The military authorities ... ordered exclusion ... *in accordance with Congressional authority* to the military to say who should, and who should not, remain in the threatened areas." (emphasis added)).

This Court has asserted its jurisdiction and protected the writ even where the executive simply detains people not admitted to enter the United States, a sphere in which this Court has concluded the political branches act with plenary power. In *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953), for example, this Court concluded that Mr. Mezei, a noncitizen seeking to enter the United States, was not entitled to full constitutional protections. In deciding not to overturn the executive's decision to exclude and detain Mr. Mezei or even require the executive to disclose its reasons for doing so, this Court did not deny Mr. Mezei the right to challenge his detention through a writ of habeas corpus. *Mezei*, 345 U.S. at 213 ("Concededly, his movements are restrained by authority of the United States, and he may by habeas corpus test the validity of his exclusion."). Rather, after implicitly determining that it had jurisdiction, this Court found that the legislature had expressly authorized the executive to do what it had done, noting that the "Attorney General may lawfully exclude [Mr. Mezei] without a hearing *as authorized by the emergency regulations promulgated pursuant*

to the Passport Act." *Id.* at 214-15 (emphasis added). *See also Zadvydas v. Davis*, 533 U.S. 678, 688 (2001) (exercising review because, while the legislature had empowered the executive with some discretion, "[t]he aliens here . . . do not seek review of the Attorney General's exercise of discretion; rather, they challenge the extent of the Attorney General's authority . . . and the extent of that authority is not a matter of discretion"); *cf. United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 544 (1950) ("Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned.").

Similarly, in *Ex parte Quirin*, this Court reviewed the executive's decision to detain the defendants—enemy aliens—and, before refusing to grant the requested writ of habeas corpus, determined that the procedures and rights afforded were those provided by the legislative branch. Referring to the Articles of War enacted by Congress, 10 U.S.C. §§ 1471 to 1593, which specifically provided for trial by military courts, this Court determined that the executive was acting pursuant to his powers as Commander in Chief but also "[b]y his Order creating the present Commission . . . has undertaken to exercise the authority conferred upon him by Congress . . . ." 317 U.S. at 28.

In *Johnson v. Eisentrager*, 339 U.S. 763 (1950), this Court did not abdicate to the executive the power of judicial review that it has guarded since *Marbury v. Madison*. Although it found that the *Eisentrager* defendants could not seek habeas relief, this Court only reached that conclusion after noting that the defendants were provided the process specifically prescribed by the legislative branch. *Id.* at 777 (defendants were tried by Military Commissions). In other words, this Court did not deny the *Eisentrager* defendants

a right to review without considering that the defendants were tried by "military tribunals under . . . [the] Articles of War." *Id.* at 797 (Black, J., dissenting). And, as this Court took great pains in *Ex parte Quirin* to note, both the military tribunals and the Articles of War were the result of legislative enactments that provided the executive the authority to use them as it did and set forth the procedures due. 317 U.S. at 25-29. *Eisentrager*, therefore, does not stand for the proposition that the executive is entitled on its own to detain and then determine the process, if any, it considers appropriate. Rather, it stands for the proposition that this Court will not review executive action properly delegated by Congress pursuant to its authority to, among other things, "declare War . . . and make Rules concerning Captures on Land and Water." U.S. Const. Art. I, § 8, cl. 10.

Thus, by its own terms, *Eisentrager* does not apply here. In both *Eisentrager* and *Ex Parte Quirin*, the executive detained prisoners and held military tribunals pursuant to Articles of War that were enacted by Congress.[2] By contrast, here, the executive is acting alone, without authorization from Congress. The legislative branch did not grant the executive the power to hold the Guantánamo detainees

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[2] Congress' September 18, 2001 Joint Resolution does not authorize the Guantánamo Bay detentions. Although it contains broad language authorizing the President to "use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001," Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001), nothing in it expressly or even inferentially authorizes the indefinite detentions at Guantánamo Bay. *See Padilla v. Rumsfeld*, __ F.3d __, 2003 WL 22965085, *11-*12, *16-*17 (2d Cir. 2003) (emphasizing need for express Congressional authorization for detentions and rejecting argument that Joint Resolution authorized detention of Padilla).

without any process or judicial review. This Court, therefore, has authority to review these detentions.[3]

III. THE INTERNATIONAL COMMUNITY RECOGNIZES THAT A STRONG, INDEPENDENT JUDICIARY IS ESSENTIAL TO THE PRESERVATION OF INDIVIDUAL FREEDOMS.

After the end of World War II, the nations of the world came together to embrace the rule of law and to declare fundamental norms among the community of nations. To that end, the United Nations was founded. Since its inception, U.N. member countries have adopted or ratified a broad panoply of declarations and treaties. Among the most important are the declarations and treaties directed toward the protection of human rights and fundamental freedoms. Time and again, the community of nations has recognized that judicial review by a strong and independent judiciary is essential to the protection of these rights and freedoms.

The United Nations articulated these shared principles most succinctly in the "Basic Principles on the Independence of the Judiciary," which was adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders in 1985, and endorsed by United Nations General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985. Among

[3] *See also Gherebi v. Bush*, __ F.3d __, 2003 WL 22971053, *5-*9 (9th Cir. 2003) (distinguishing *Eisentrager* on the grounds that, unlike the Landsberg Airbase in Germany that was the territory at issue in that case and over which the United States, Great Britain and France exercised joint control, the 1903 lease governing the terms of Guantánamo Bay's territorial relationship to the United States cedes to the U.S. alone "complete jurisdiction and control").

the basic principles it articulated was the following: "3. The judiciary shall have jurisdiction over all issues of a judicial nature and shall have exclusive authority to decide whether an issue submitted for its decision is within its competence as defined by law." *Available at* http://www.hfhrpol.waw.pl/EN-RTF/en-5-5.htm (viewed Jan. 8, 2004).

The Universal Declaration of Human Rights, which is one of the foundational documents of modern international law and was modeled in part on the U.S. Bill of Rights, specifically enunciates the right to "full equality to a fair and public hearing by an independent and impartial tribunal." U.N.G.A. Res. 217A (III), U.N. Doc. A/810, at 71, *adopted* 10 Dec. 1948, Article 10. The United States voted for its adoption, and Congress reaffirmed its commitment to it on its 50th anniversary in 1998. *See* http://usinfo.state.gov/journals/itdhr/1098/ijde/perspect.htm#congress. Similarly, the International Convention on Civil and Political Rights (the "ICCPR"), to which the United States is a party, provides that a hearing "by a competent, independent and impartial tribunal established by law" is a fundamental element of minimum due process. 999 U.N.T.S. 171, 175, Dec. 16, 1966. *See also* ICCPR Art. 9, §§ 1-4 *available at* http://austlii.law.uts.edu.au/au/other/media.OLD/8246.html (viewed Jan. 8, 2004).

According to Dato' Param Cumaraswamy, the United Nations Special Rapporteur on the Independence of Judges and Lawyers, an "autonomous, independent, impartial and effective judicial system is a prerequisite for a democracy in which respect for and promotion of human rights are guaranteed." Roman Wieruszewski, *Seminar on the Interdependence Between Democracy and Human Rights*, U.N. Treaty Bodies and Special Procedures and the Strengthen-

ing of Democracy, Office of the High Comm. for Human Rights, at 16 (25-26 Nov. 2002, Geneva). The Special Rapporteur also has observed that among the "essential elements of the right to democracy" are the "rule of law, including legal protection of citizens' rights, interests and personal security, and fairness in the administration of justice and independence of the judiciary." *Id.* at 3, *available at* http://www.unhchr.ch/democracy/D-Wieruszewski.pdf (viewed Jan. 8, 2004).

Other intergovernmental organizations also have consistently affirmed the importance of an independent judiciary. This is reflected in provisions of the Charter of the Organization of American States,[4] the American Convention on Human Rights,[5] the African Charter on Human and Peoples' Rights,[6] the European Convention for the Protection of Human Rights and Fundamental Freedoms,[7] the Convention on Human Rights and Fundamental Freedoms of the

[4] OAS Treaty Series, Nos. 1-C and 61, U.N.T.S., No. 1609, Vol. 119, *entered into force* April 30, 1948.

[5] O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123, *signed* 22 November 1969, *entered into force* 18 July 1978 (art. 3: right to recognition before the law; art. 7: right to liberty, due process, and judicial review; art. 8: right to hearing with due process guarantees).

[6] O.A.U. Doc. CAB/LEG/67/3 Rev.5, *adopted* 27 June 1981, *entered into force* 21 October 1986 (art. 6: right to liberty; art. 7(1): right to have cause heard; art. 7(1)(b): presumption of innocence; art. 7(1)(d): right to be tried within reasonable time by impartial tribunal).

[7] 213 U.N.T.S. 221, *signed* 4 November 1950, *entered into force* 3 February 1953 (providing for judicial review in article 5(3)-(4)). In *Ocalan v. Turkey*, Appl. No. 46221/99, 37 Eur. H.R. Rep. 10 (March 2003), the European Commission on Human Rights found a violation of the European Convention on Human Rights when an applicant was not brought before a judge within seven days of his arrest to determine the propriety of his detention.

Commonwealth of Independent States,[8] and the Copenhagen Document, developed by the Conference for Security and Co-operation in Europe.[9] The signatories to the Copenhagen Document committed "to support and advance those principles of justice which form the basis of the rule of law."[10]

Nor is the international community unaware of the dangers a country confronts when faced with a hostile neighbor. However, the U.N. Human Rights Committee has declared that even in times of emergency a state 'may not depart from the requirement of effective judicial review of detention.' Jordan J. Paust, *Judicial Power to Determine the Status and Rights of Persons Detained Without Trial*, 44 HARVARD INT'L. L. J. 503, 509 (2003) (*quoting* U.N. Human Rights Comm., General Comment No. 29, at 11, 16, and n. 9, U.N. Doc. CCPR/C/21/Rev.1/Add.11 (2001)).

IV. A STRONG, INDEPENDENT JUDICIARY IS ESSENTIAL TO THE PROTECTION OF INDIVIDUAL FREEDOMS AND THE ESTABLISHMENT OF STABLE GOVERNANCE IN EMERGING DEMOCRACIES AROUND THE WORLD.

A. Individual Nations Have Accepted and Are Seeking to Implement Judicial Review By A Strong, Independent Judiciary.

Many of the newly independent governments that have proliferated over the past five decades have adopted these

[8] Council of Europe doc. H(95)7 rev (1995).

[9] Copenhagen Document, ¶¶2, 3, 29 June 1990, 29 I.L.M. 1305, *available at* http://www.osce.org/docs/english/1990-1999/hd/cope90e.htm (viewed Jan. 8, 2004).

[10] *Id.*

ideals. They have emerged from a variety of less-than-free contexts, including the end of European colonial rule in the 1950's and 1960's, the end of the Cold War and the breakup of the former Soviet Union in the late 1980's and 1990's, the disintegration of Yugoslavia, and the continuing turmoil in parts of Africa, Latin America and southern Asia. Some countries have successfully transitioned to stable and democratic forms of government that protect individual freedoms and human rights by means of judicial review by a strong and independent judiciary. Others have suffered the rise of tyrannical and oppressive rulers who consolidated their hold on power in part by diminishing or abolishing the role of the judiciary. And still others hang in the balance, struggling against the onslaught of tyrants to establish stable, democratic governments.

In their attempts to shed their tyrannical pasts and to ensure the protection of individual rights, emerging democracies have consistently looked to the United States and its Constitution in fashioning frameworks that safeguard the independence of their judiciaries. *See* Ran Hirschl, *The Political Origins of Judicial Empowerment through Constitutionalization: Lessons from Four Constitutional Revolutions*, 25 LAW & SOC. INQUIRY 91, 92 (2000) (stating that of the "[m]any countries . . . [that] have engaged in fundamental constitutional reform over the past three decades," nearly all adopted "a bill of rights and establishe[d] some form of active judicial review"). Establishing judicial review by a strong and independent judiciary is a critical step in stabilizing and protecting these new democracies. *See* Christopher M. Larkins, *Judicial Independence and Democratization: A Theoretical and Conceptual Analysis*, 44 AM. J. COMP. L. 605, 605-06 (1996) (describing the judicial branch as having "a uniquely

important role" in transitional countries, not only to "mediate conflicts between political actors but also [to] prevent the arbitrary exercise of government power; *see also* Daniel C. Prefontaine and Joanne Lee, *The Rule of Law and the Independence of the Judiciary*, International Centre for Criminal Law Reform and Criminal Justice Policy (1998) ("There is increasing acknowledgment that an independent judiciary is the key to upholding the rule of law in a free society . . . . Most countries in transition from dictatorships and/or statist economies recognize the need to create a more stable system of governance, based on the rule of law."), *available at* http://www.icclr.law.ubc.ca/Publications/Reports/RuleofLaw.pdf (viewed Jan. 8, 2004). Although the precise form of government differs among countries, "they ultimately constitute variations within, not from, the American model of constitutionalism . . . [a] specific set of fundamental rights and liberties has the status of supreme law, is entrenched against amendment or repeal . . . and is enforced by an independent court . . . ." Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism*, 49 AM. J. COMP. L. 707, 718 (2001).

This phenomenon became most notable worldwide after World War II when certain countries, such as Germany, Italy, and Japan, embraced independent judiciaries following their bitter experiences under totalitarian regimes. *See id.* at 714-15; *see also United States v. Then*, 56 F.3d 464, 469 (2d Cir. 1995) (Calabresi, J., concurring) ("Since World War II, many countries have adopted forms of judicial review, which—though different from ours in many particulars—unmistakably draw their origin and inspiration from American constitutional theory and practice. *See generally* Mauro Cappelletti, *The Judicial Process in Com-*

parative Perspective (Oxford: Clarendon Press, 1989).”). It is a trend that continues to this day.

It bears mention that the United States has consistently affirmed and encouraged the establishment of independent judiciaries in emerging democracies. In September 2000, President Clinton observed that “[w]ithout the rule of law, elections simply offer a choice of dictators. . . . America’s experience should be put to use to advance the rule of law, where democracy’s roots are looking for room and strength to grow.” Remarks at Georgetown University Law School, 36 Weekly Comp. Pres. Doc. 2218 (September 26, 2000), *available at* http://clinton6.nara.gov/2000/09/2000-09-26-remarks-by-president-at-georgetown-international-law-center.html. The United States acts on these principles in part through the assistance it provides to developing nations. For example, the United States requires that any country seeking assistance through the Millenium Challenge Account, a development assistance program instituted in 2002, must demonstrate, among other criteria, an “adherence to the rule of law.” The White House noted that the rule of law is one of the “essential conditions for successful development” of these countries. *See* http://www.whitehouse.gov/infocus/developingnations (viewed Jan. 8, 2004).[11]

[11] The United States encourages other countries to develop independent judiciaries through other aspects of American foreign policy as well. It has, for example, conditioned the continuation of trade benefits to certain countries where the protection of human rights has come into doubt, such as Swaziland, on their maintenance of the rule of law and the independence of the judiciary. *See, e.g.*, “Employers lash out at Swazi government, demand return to rule of law,” Agence France Presse, *available at* 2002 WL 23671087, December 13, 2002. Similarly, in June 2002, President Bush declared that United States support for a Palestinian state depends in part on Palestinian adoption of an independent judiciary. White House Press Release, June 24, 2002, *available at* http://www.whitehouse.gov/news/releases/2002/06/200206243.html.

A few examples illustrate the influence of the United States model. On November 28, 1998, Albania adopted a new constitution, representing the culmination of eight years of democratic reform after the communist rule collapsed. In addition to protecting fundamental individual rights, the Albanian Constitution provides for an independent judiciary consisting of a Constitutional Court with final authority to determine the constitutional rights of individuals. Albanian Constitution, Article 125, Item 1 and Article 128; *see also* Darian Pavli, “A Brief ‘Constitutional History’ of Albania” *available at* http://www.ipls.org/services/others/chist.html (viewed Jan. 8, 2004); Jean-Marie Henckaerts & Stefaan Van der Jeught, *Human Rights Protection Under the New Constitutions of Central Europe*, 20 LOY. L.A. INT’L & COMP. L. REV. 475 (Mar. 1998).

In South Africa, the new constitutional judiciary plays a similarly important role, following generations of an oppressive apartheid regime. South Africa adopted a new constitution in 1996. Constitution of the Republic of South Africa, Explanatory Memorandum. It establishes a Constitutional Court which “makes the final decision whether an Act of Parliament, a provincial Act or conduct of the President is constitutional.” *Id.* at Chapter 8, Section 167, Item (5), *available at* http://www.polity.org.za/html/govdocs/constitution/saconst.html?rebookmark=1 (viewed Jan. 8, 2004); *see also* Justice Tholakele H. Madala, *Rule Under Apartheid and the Fledgling Democracy in Post-Apartheid South Africa: The Role of the Judiciary*, 26 N.C. J. INT’L L. & COM. REG. 743 (Summer 2001).

Afghanistan is perhaps the most recent example of a country struggling to develop a more democratic form of government. Adoption by the Loya Jirga of Afghanistan's new constitution on January 4, 2004 has been hailed as a milestone. *See* http://www.cbsnews.com/stories/2004/01/02/world/main591116.shtml (Jan. 7, 2004). The proposed constitution creates a judiciary that, at least on paper, is "an independent organ of the state," with a Supreme Court empowered to review the constitutionality of laws at the request of the Government and/or the Courts. Afghan Const. Art. 116, 121 (unofficial trans.), *available at* http://www.hazara.net/jirga/AfghanConstitution-Final.pdf (viewed Jan. 8, 2004). *See also* Ron Synowitz, Afghanistan: Constitutional Commission Chairman Presents Karzai with Long-Delayed Draft Constitution (Nov. 3, 2003), *available at* http://www.rferl.org/nca/features/2003/11/03112003164239.asp (viewed Jan. 8, 2004).

B. Other Nations Have Curtailed Judicial Review During Times Of Crisis, Often Citing the United States' Example, And Individual Freedoms Have Diminished As A Result.

While much of the world is moving to adopt the institutions necessary to secure individual rights, many still regularly abuse these rights. One of the hallmarks of tyranny is the lack of a strong and independent judiciary. Not surprisingly, where countries make the sad transition to tyranny, one of the first victims is the judiciary. Many of the rulers that go down that road justify their actions on the basis of national security and the fight against terrorism, and, disturbingly, many claim to be modeling their actions on the United States.

Again, a few examples illustrate this trend. In Peru, one of former President Alberto Fujimori's first acts in seizing control was to assume direct executive control of the judiciary, claiming that it was justified by the threat of domestic terrorism. He then imprisoned thousands, refusing the right of the judiciary to intervene. International Commission of Jurists, *Attacks on Justice 2000-Peru*, Aug. 13, 2001, *available at* http://www.icj.org/news.php3?id_article=2587&lang=en (viewed Jan. 8, 2004).

In Zimbabwe, President Mugabe's rise to dictatorship has been punctuated by threats of violence to and the co-opting of the judiciary. He now enjoys virtually total control over Zimbabweans' individual rights and the entire political system. R.W. Johnson, *Mugabe's Agents in Plot to Kill Opposition Chief*, Sunday Times (London), June 10, 2001; International Commission of Jurists, *Attacks on Justice 2002-Zimbabwe*, Aug. 27, 2002, *available at* http://www.icj.org/news.php3?id_article=2695&lang=en (viewed Jan. 8, 2004).

While Peru and Zimbabwe represent an extreme, the independence of the judiciary is under assault in less brazen ways in a variety of countries today. A highly troubling aspect of this trend is the fact that in many of these instances those perpetuating the assaults on the judiciary have pointed to the United States' model to justify their actions. Indeed, many have specifically referenced the United States' actions in detaining persons in Guantánamo Bay.

For example, Rais Yatim, Malaysia's "de facto law minister" explicitly relied on the detentions at Guantánamo to justify Malaysia's detention of more than 70 suspected Islamic militants for over two years. Rais stated that

Malaysia's detentions were "just like the process in Guantánamo," adding, "I put the equation with Guantánamo just to make it graphic to you that this is not simply a Malaysian style of doing things." Sean Yoong, "Malaysia Slams Criticism of Security Law Allowing Detention Without Trial," Associated Press, Sept. 9, 2003 (*available from Westlaw at* 9/9/03 APWIRES 09:34:00).

Similarly, when responding to a United States Government human rights report that listed rights violations in Namibia, Namibia's Information Permanent Secretary Mocks Shivute cited the Guantánamo Bay detentions, claiming that "the US government was the worst human rights violator in the world." BBC Monitoring, Mar. 8, 2002, *available at* 2002 WL 15938703.

Nor is this disturbing trend limited to these specific examples. At a recent conference held at the Carter Center in Atlanta, President Carter, specifically citing the Guantánamo Bay detentions, noted that the erosion of civil liberties in the United States has "given a blank check to nations who are inclined to violate human rights already." Doug Gross, "Carter: U.S. human rights missteps embolden foreign dictators," Associated Press, Nov. 12, 2003 (*available from Westlaw at* 11/12/03 APWIRES 00:30:26). At the same conference, Professor Saad Ibrahim of the American University in Cairo (who was jailed for seven years after exposing fraud in the Egyptian election process) said, "Every dictator in the world is using what the United States has done under the Patriot Act . . . to justify their past violations of human rights and to declare a license to continue to violate human rights." *Id.*

Likewise, Shehu Sani, president of the Kaduna, Nigeria-based Civil Rights Congress, wrote in the *International Herald Tribune* on September 15, 2003 that

> [t]he insistence by the Bush administration on keeping Taliban and Al Quaeda captives in indefinite detention in Guantánamo Bay, Cuba, instead of in jails in the United States—and the White House's preference for military tribunals over regular courts—helps create a free license for tyranny in Africa. It helps justify Egypt's move to detain human rights campaigners as threats to national security, and does the same for similar measures by the governments of Ivory Coast, Cameroon and Burkina Faso.

Available at http://www.iht.com/ihtsearch.php?id=109927&owner=(IHT)&date=20030121123259.

In our uni-polar world, the United States obviously sets an important example on these issues. As reflected in the foundational documents of the United Nations and many other such agreements, the international community has consistently affirmed the value of an independent judiciary to the defense of universally recognized human rights. In the crucible of actual practice within nations, many have looked to the United States model when developing independent judiciaries with the ability to check executive power in the defense of individual rights. Yet others have justified abuses by reference to the conduct of the United States. Far more influential than the words of Montesquieu and Madison are the actions of the United States. This case starkly presents the question of which model this Court will set for the world.

CONCLUSION

Much of the world models itself after this country's two hundred year old traditions—and still more on its day to day implementation and expression of those traditions. To say that a refusal to exercise jurisdiction in this case will have global implications is not mere rhetoric. Resting on this Court's decision is not only the necessary role this Court has historically played in this country. Also at stake are the freedoms that many in emerging democracies around the globe seek to ensure for their peoples.

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